

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

LINDA BENAVIDEZ,

Plaintiff,

v.

CIV NO. 1:15-CV-00922-MV-LF

**SANDIA NATIONAL LABORATORIES,
VARICK TUCKER (Personally), and
TIMOTHY GARDNER (Personally),**

Defendants.

DEFENDANTS' DISCLOSURE OF ADVERSE AUTHORITY

In Defendants' Motion to Dismiss, Defendants argued that Plaintiff's New Mexico Human Rights Act claims against Defendants Gardner and Tucker must be dismissed for failure to exhaust administrative remedies, citing *Luboyeski v. Hill*, 1994-NMSC-032, ¶ 7, 872 p.2d 353, 355.¹ In her Response, Plaintiff acknowledged that the individual Defendants cannot be sued under the NMHRA, and agreed to withdraw those claims.²

Counsel for Defendants has since learned of the New Mexico Supreme Court's decision in *Lobato v. New Mexico Environment Department*, 2012-NMSC-002, 267 P.3d 65. *Lobato* does not overrule *Luboyeski*, and in fact cites *Luboyeski* for the proposition that individual defendants cannot be named for the first time in court. 1994-NMSC-032, ¶ 10. However, the New Mexico Supreme Court did find that in the "limited circumstances" of that case, the plaintiff's claims survived his failure exhaust administrative remedies in large part because the Charge of Discrimination form and related administrative procedures did not adequately instruct him to

¹ See Defendants' Motion to Dismiss [Doc. 7] at page 8.

² See Plaintiff's Response To Defendants' Motion to Dismiss (Doc. 7), Request For Remand, and Memorandum in Support [Doc. 16] at page 12.

identify individuals. *Id.* at ¶ 14. The undersigned counsel believes the *Lobato* case may be directly adverse authority, and accordingly is disclosing it to the Court.

Respectfully submitted,

By /s/ Justin E. Poore

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendants' Disclosure of Adverse Authority was filed electronically with the court through CM/ECF on this 8th day of December, 2015, which caused the following Parties or Counsel to be served by electronic means:

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